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October Term, 1975

Nos. 75-353
75-354
75-355

HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., THE FIRST BOSTON CORPORATION, BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, and DAVID W. WALLACE,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

This brief is submitted by respondent Chris-Craft Industries, Inc., in opposition to three petitions for writs of certiorari filed by Bangor Punta Corporation and two of its officers, by former insiders of the Piper Aircraft Corporation and by The First Boston Corporation.

Questions Presented

This case presents no issue worthy of certiorari. It raises no conflicts among the circuits or unsettled questions of law. Instead, it involves traditional legal principles applied to the litigated and now undisputed facts.

This is a case of massive violations of the anti-fraud and anti-manipulation provisions of the federal securities laws. After extensive non-jury trials, the Second Circuit held on three separate occasions, in a series of opinions totaling almost 200 pages, that petitioners had committed blatant violations and inflicted extensive injury on Chris-Craft. *Chris-Craft I* (426 F.2d 569) and *Chris-Craft II* (480 F.2d 341) found the violations and the injury. *Chris-Craft III* (516 F.2d 172) calculated the damages. The Second Circuit acted *en banc* in the first case and *en banc* reconsideration was denied in the other two appeals (E 13-15, E 6-8).*

No new legal principles were involved in these appeals —merely the application of well-worn principles to overwhelming evidence of fraud. Indeed, the *Chris-Craft* opinions have already been cited with approval in over 50 reported cases throughout the nation precisely because they reflect well-established legal principles long approved by this Court.

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* References preceded by a letter are to petitioners' Joint Appendices in this Court. References followed by "A" are to the Appendix filed in the Second Circuit in *Chris-Craft III*. References preceded by "EV" are to the Exhibit Volumes filed in the Second Circuit in *Chris-Craft III*.

Significantly, petitioners no longer deny their violations. Nor do they deny that those violations spelled the mathematical difference between victory and defeat in an extremely close contest between Bangor Punta and Chris-Craft for control of Piper. Petitioners won because they violated the law. Chris-Craft lost because it obeyed the law. As a result, Chris-Craft's $60 million investment* in Piper was converted into an albatross—an unsalable, huge minority block.

This case is before this Court for the second time. Two years ago, this Court denied similar certiorari petitions. 414 U.S. 910 (1973).

In these circumstances, the petitions raise the following questions:

1. Should this Court grant certiorari where the Second Circuit's opinions apply traditional and conservative standards approved by this Court, and where there are no conflicts among the circuits or novel questions of law?

2. Should this Court grant certiorari to review the Second Circuit's arithmetic as to damages, where the Court expressly awarded the "minimum" measure of damages that the District Court could have awarded on the full record, and where the testimony of petitioners' own star expert led to virtually the same damage figure?

3. Should this Court grant certiorari to consider petitioners' belated request for an apportionment of damages

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* This includes Chris-Craft's $44 million investment in acquiring Piper stock plus more than $14 million in carrying charges.

among the wrongdoers, where this matter was not asserted below and where petitioners can resolve their internecine disputes another day in their own separate proceeding for contribution?

4. Should this Court grant certiorari to consider First Boston's claim that investment bankers are immune from liability in control contests regardless of their conduct by virtue of Section 11 of the Securities Act of 1933, even though First Boston here was held liable under the far more stringent fraud standards of Section 14(e) of the Securities Exchange Act of 1934 and even though it is settled law that persons guilty of violating the anti-fraud provisions of the securities laws cannot hide behind Section 11?

Statement of the Case

This six year old case—involving a litigated record of almost 5,000 pages—arises out of a 1969 struggle between Bangor and Chris-Craft for control of Piper, then a publicly-held corporation listed on the New York Stock Exchange. Chris-Craft, as noted above, invested approximately $60 million in the contest, including carrying charges, and concededly would have held a commanding lead in a fair contest not tainted by petitioners' repeated violations. But instead, Chris-Craft ultimately lost by 50%-42% because Bangor acquired 14½% of Piper's shares by admitted violations of the securities laws. In addition to depriving Chris-Craft of a fair opportunity to compete for control, petitioners' fraudulent conduct reduced its multi-million dollar investment into an illiquid minority block salable, if at all, only at a distress price.

Since the facts are fully set forth in the Second Circuit's three well-reasoned opinions, we summarize only the highlights.

The Pipers' Scorched Earth Policy

On January 23, 1969,* Chris-Craft announced a cash tender offer to Piper stockholders for 300,000 or more shares at $65 a share (A 10, EV 709).** Piper's insiders, threatening to pursue a "scorched earth policy" to stop Chris-Craft (1890A), summoned First Boston to assist in a campaign against it (A 10-11). Four days later, the insiders wrote to Piper's public shareholders that Chris-Craft's offer was "inadequate," even though First Boston had privately advised them that $65 was in fact a fair price (A 11, 38). The Second Circuit held that these letters violated Section 14(e) of the Williams Act,† a 1968 amendment to the Securities Exchange Act of 1934:

> "The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing .... The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading." (A 38)

A few days later, the Piper insiders issued a press release stating that Grumman Aircraft Corp. had "agreed to purchase" 300,000 Piper shares at $65 a share—*i.e.*, a firm commitment to invest almost $20,000,000 in Piper.

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* All dates herein refer to 1969 unless otherwise indicated.

** Chris-Craft had previously purchased approximately 200,000 of Piper's 1,644,890 outstanding shares (A 10).

† 15 U.S.C. §78n(e).

But, in truth, the Piper insiders had merely given Grumman a free *option* to purchase those shares—an option that lapsed (A 11-12, 39). Piper's president admitted that the aim of the Grumman escapade was to make Chris-Craft's tender offer "less attractive to our shareholders" (2114-15A). It had the intended effect. The Second Circuit recognized that the fraudulent press release "adversely affected" Chris-Craft's tender offer:

> ". . . Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e) . . . . The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer." (A 39-40)

Because of the foregoing fraudulent statements, Chris-Craft's tender offer—although $12.50, or 20%, above the then stock market price—attracted only about 300,000 of the more than 900,000 Piper shares in the public's hands (A 10, 12, 62). The Second Circuit, after carefully reviewing the extensive trial record, concluded that those fraudulent statements not only deprived Chris-Craft of an opportunity to gain more shares on its cash tender offer but also had a continuing adverse effect on Chris-Craft throughout the contest:

> "[T]hese misleading statements more than likely had a continuing adverse effect on CCI's attempt to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's [subsequent] exchange offer, many undoubtedly remembered and were influenced by the Piper family's misleading January statements portraying CCI as a company that made inadequate and unfair offers." (A 62-63)

Bangor Punta Enters the Contest

On May 8, the day after Chris-Craft announced an exchange offer to Piper shareholders, the insiders turned to Bangor, recruited by First Boston, to resist Chris-Craft (A 14). The insiders sold their Piper holdings (approximately 30%) to Bangor in exchange for a package of Bangor securities worth $70-$72 per Piper share (A 14). Bangor simultaneously agreed to offer Piper's public shareholders what Bangor's and Piper's joint May 8 press release referred to as "a package of Bangor Punta securities to be valued in the judgment of The First Boston Corporation at not less than $80 per Piper share" (329A). The Second Circuit, *en banc*, held that the press release violated the SEC's "gun-jumping" rule* because it placed a dollar value on an unspecified bundle of Bangor securities as to which no registration statement had been filed (C 9-15).** The SEC brought an action against Piper and Bangor for this violation. They consented to an injunction against further violations of the securities laws during the control contest (A 15, C 6).

To insure the success of its exchange offer, Bangor gave the Piper insiders a private incentive to use their influence with Piper's public shareholders. Thus, Bangor promised to increase the compensation to the insiders from $70 to $80 per share if they helped Bangor obtain more than

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* 15 U.S.C. §77e; 17 C.F.R. §230.135.

** In contrast, Chris-Craft's announcement of its exchange offer for Piper stock complied with SEC rules by placing no value on its package.

50% of Piper's stock (A 14-15). By July 18, the effective date of Bangor's exchange offer, the Piper insiders stood to reap a windfall of $13,000,000 (EV 259-60) if they could persuade enough public shareholders to accept Bangor's exchange offer instead of Chris-Craft's. Accordingly, the insiders issued letters and press releases in June and July urging the public shareholders to side with Bangor instead of Chris-Craft. Those communications all concealed the $13,000,000 bonus (A 40-41). The Second Circuit, again finding a Section 14(e) violation, stated:

> "Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family. *Cf. SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 197-201 (1963)." (A 41)*

Bangor Punta's Illegal Cash Purchases of Key Blocks from Cornfeld and Others

Petitioners and Chris-Craft recognized that the close control contest might well depend on certain key blocks of Piper stock (approximately 7½% of the outstanding shares) held by three funds, the largest of which was controlled by Bernard Cornfeld.** But SEC Rule 10b-6† pro-

* But the Second Circuit, applying a strict standard of causation, held that this violation did not injure Chris-Craft because Chris-Craft had discovered the side-deal and reported it to Piper shareholders (A 63).

** At an April meeting attended by all petitioners, First Boston stated that if these blocks could be taken "from under" Chris-Craft, petitioners' chances of victory were good (382A-1). Drafts of the agreement between Bangor and the Piper insiders obligated Bangor to solicit those blocks (383-84A; EV 174-257). And Bangor's internal memorandum recognized that its success depended on acquiring those blocks (EV 298), which were "emotionally committed" to Chris-Craft (1836A).

† 17 C.F.R. §240.10b-6.

hibited either side from making cash purchases of those swing blocks because they had announced exchange offers to the public (C 15-18). The SEC specifically placed the parties on notice of Rule 10b-6's prohibition (A 13, 15-16). Chris-Craft obeyed the SEC. Bangor defied it. Within days of the SEC warning, Bangor paid $9,000,000 for those 7½% blocks, contrary to the advice of its own lawyers (A 16; 1645A). As a result, Bangor stated in a complaint in a related action that Chris-Craft's bid for Piper was now no longer viable. The Second Circuit *en banc* held that those cash acquisitions clearly violated Rule 10b-6 (C 15-18). In *Chris-Craft II*, the court went on to stress:

> "Even arithmetically, it is apparent that the blocks purchased in violation of Rule 10b-6 were essential to achieve control. BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings." (A 67; *see also* A 96, 111)

Bangor Punta's and First Boston's False Prospectus

Finally, Bangor acquired another 7% of Piper's stock by a fraudulent exchange offer to Piper's public shareholders in competition with Chris-Craft's exchange offer in July. Bangor's offer stated that its railroad subsidiary (BAR) had a carrying value of $18.4 million, although Bangor was then negotiating to sell BAR for $5 to $7 million to the only interested purchaser, after a long search (A 43-45, 51-54; D 14). Bangor actually authorized the sale of BAR for $5 million four days after the control contest ended (A 44). If BAR's true value had been disclosed in the exchange offer, it would have converted Bangor's per share earnings of $3.04 reported in its prospectus (EV 38)

into a loss of $1.28 per share (D 15) and wiped out 36% of Bangor's retained earnings and 12% of the stockholders' equity (A 46; D 15). The trial court, after considering all the evidence, found the BAR omission to be materially misleading (D 15). The Second Circuit agreed that the Bangor petitioners "showed reckless disregard for the import of their activities concerning the BAR" because "[t]hey knew that the book value of the BAR set forth in the registration statement was no longer realistic" (A 47-48).

No one defends the BAR fraud in this Court. The impact of this fraud, established by the trial record, was dramatic. Chris-Craft's exchange offer attracted slightly more Piper shares than had Bangor's fraudulent offer (A 18). Thus, if disclosed, the $13,400,000 BAR loss would have been critical. The Second Circuit declared:

> ". . . BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers . . . . [I]t is clear that the 7% acquired through its exchange offer was critical to its success." (A 60)

First Boston was also found guilty of violating the anti-fraud provisions of Section 14(e) in connection with Bangor's exchange offer. It acted as the underwriter of the fraudulent offer and endorsed and distributed the prospectus to Piper's public shareholders.* Although it had read in Bangor's minutes that the board was prepared to sell BAR for $5 to $7 million (A 51-54), First Boston concealed that information and endorsed the fraudulent

* First Boston simultaneously acted as the appraiser to assure Piper's public shareholders that Bangor's package of securities was worth $80 per Piper share.

$18.4 million figure as BAR's value. The Second Circuit declared:

> ". . . First Boston's certification of the BPC registration statement carrying the BAR at $18.4 million amounted to an almost complete abdication of its responsibility to potential investors, to CCI, and to others who relied upon it to detect misrepresentations. We hold that First Boston possessed enough information reasonably to deduce that the BPC registration statement was materially inaccurate." (A 55)

The Critical Effect of Petitioners' Combined Violations

At every stage of the contest, petitioners committed flagrant violations of the securities laws—so flagrant that the SEC brought two actions against Bangor and the New York Stock Exchange initiated disciplinary proceedings against Piper. There has never been a control contest that was so close, in which one side's misbehavior was so persistent, and in which the victim's injury was so great.

Petitioners' combined violations gave Bangor an unbeatable 45%-41% lead over Chris-Craft at the close of the competing exchange offers in August. Then, with only a relatively few Piper shares remaining in public hands, Bangor was in a position to pick up majority control by purchasing only one share for every two that Chris-Craft needed—thus it could pay double the price per share that Chris-Craft could. The "scorched earth policy" had worked. The contest was over. Bangor proceeded to buy the few additional shares it needed to reach 50%.

In the absence of Bangor's unlawful acquisitions of 14½% of Piper's stock, Chris-Craft would have led by at

least 41% to 31% at the end of the exchange offers in August.* In *Chris-Craft II*, the Second Circuit stated, "CCI has shown that it had a reasonable chance of obtaining control of Piper . . ." (A 32). In the subsequent trial in *Chris-Craft III*, all the experts (including petitioners' star expert) agreed that Chris-Craft's 41%-31% lawful plurality lead in a fair contest would have been virtually insurmountable (2430-31A, 2629-30A, 2722A, 3020A).

In addition, petitioners' combined violations converted Chris-Craft's multi-million dollar investment into a virtually unsalable minority position. All experts on both sides agreed that no private purchaser would touch Chris-Craft's block "with a ten-foot pole" (3023A, 2435-36A, 2578-79A, 2633-34A, EV 1244-46; B 28).** Chris-Craft's only possible escape from its locked-in position, according to the experts on both sides, was a registered public offering of its 700,000 share block at a distress price (B 28; EV 834, 1236, 1246). The undisputed trial record demonstrated

* Chris-Craft undoubtedly would have held an even larger lead because in January, the Piper insiders dissuaded public stockholders from tendering more shares to Chris-Craft by fraudulent statements—statements which also prejudiced Chris-Craft later in the control contest when it made its exchange offer to Piper's public shareholders (A 62-63). Moreover, on the competing exchange offers in July, Chris-Craft obtained slightly more shares than Bangor; if the BAR over-valuation had been disclosed, it is unlikely that Bangor would have found any takers (A 60). Thus Chris-Craft would have obtained some, if not most, of the Piper shares tendered to Bangor.

** That is so because a potential purchaser would have been at the complete mercy of Bangor with respect to management and policy decisions. More importantly, he would also have been under the constant cloud of a merger threat by Bangor at an uncertain date selected by Bangor for its own advantage. At that time, a purchaser of Chris-Craft's block would have been forced either to accept a grab-bag of Bangor securities or to engage in a protracted and uncertain statutory appraisal proceeding—both unappealing alternatives (EV 884-85, 922).

that a public offering could not have taken place prior to January 1970 at the earliest (on assumptions most favorable to petitioners) and would have netted Chris-Craft only about $27 per share (B 29) compared to its average cost of $64 per share (B 25). Petitioners offered no evidence to the contrary.*

The Second Circuit, although recognizing that the *value* of Chris-Craft's leading plurality in a fair contest would have substantially exceeded its *cost* because the block would have carried a premium for control (B 21),** nevertheless took a conservative approach, opting for the lower *cost* figure, and calculated Chris-Craft's damages as the difference between its average cost per share ($64) and the highest price it could have obtained on a public offering at the earliest date ($27). The Second Circuit unanimously

* Instead, petitioners' principal expert Gant had simply assumed, because that was part of his assigned task from petitioners, that Chris-Craft had made a hypothetical "overnight" public offering on the very day that Bangor achieved control (September 5, 1969); and he then estimated that a public offering on that particular date would have netted Chris-Craft about $40 a share. But Gant refused to testify that a public offering was *in fact* possible in September 1969 (*see* 2822-31A); and the Second Circuit held that legal and practical requirements, established by the undisputed record, would have made a public offering impossible until January 1970 at the very earliest (B 28-29). A public offering would have required the preparation of registration material, audited financials for Piper's year ended September 30, 1969, cooperation of Bangor and the Pipers, Bangor's statement of its intentions as to a merger, and SEC approval of the registration materials (2827-31A, 2435-42A). Although Piper's audited financials were delayed until May 1970, respondent's expert and the Second Circuit assumed a public offering in January 1970—an assumption most favorable to petitioners, since the market had collapsed by May 1970 (2455-56A).

** While Chris-Craft's average cost per share of Piper was $64 (B 25-26), the trial record showed that its plurality block had a *value* of $72 per share because, as all the experts agreed, Chris-Craft would have had an overwhelming chance of success with a 41%-31% lead in a lawful contest (2430A). Indeed, Bangor paid about $80 per share in cash for the key Cornfeld block (A 16).

described this as "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). And the court pointed out that virtually the same quantum of damages would have resulted if it had used petitioners' alternative hypothetical estimate of the price that Chris-Craft would have realized assuming *arguendo* that it could have found a private purchaser (B 31-32 n. 24).

The Second Circuit allowed pre-judgment interest, as had the District Court, but refused to award Chris-Craft consequential damages in the form of its carrying charges (more than $14 million) on its Piper investment or attorneys' fees (B 32-36). The Second Circuit also affirmed the District Court's fashioning of equitable relief, which left Bangor in *de facto* control of Piper with the right to take Chris-Craft's stock by merger at any time of its choice after 1979 (B 38-40).

Summary of Argument

Only the facts—nothing else—are unusual about this case. Bangor illegally acquired two 7% Piper blocks. Without either one, Bangor would not have 50%; without both, Chris-Craft would have held an insurmountable 41%-31% lead in the contest. The Piper insiders also frustrated Chris-Craft's chance for a fair contest by issuing fraudulent press releases; and First Boston promoted Bangor's fraudulent prospectus despite its knowledge that BAR was grossly overvalued. In short, the violations stand admitted. The injury is indisputable. The damages are a matter of mathematics. There is no issue worthy of certiorari.

Petitioners, however, claim that certiorari is now required because of this Court's recent opinions in *Blue Chip* and *Rondeau* and its decision to grant certiorari in *Hochfelder*.* We assume that petitioners, in reply, will also rely on this Court's recent grant of certiorari in *TSC*.** But far from supporting petitioners, those recent actions merely reinforce the conclusion that there is no basis for granting certiorari here.

In *Rondeau*, this Court, reversing the Seventh Circuit, insisted on a traditional showing of irreparable injury for a preliminary injunction—just as the Second Circuit did here in denying such an injunction (C 8-9). *Rondeau*, moreover, stressed that the Williams Act was designed to protect parties like Chris-Craft in control contests. 95 S.Ct. 2069, 2076.

In *Blue Chip*, this Court, reversing the Ninth Circuit, denied standing to a passive bystander, who had made no actual purchases of stock, in order to discourage "blackmail" suits—hardly a germane precedent here where Chris-Craft invested $60 million expecting a fair contest but was crippled by petitioners' violations.

In *Hochfelder*, certiorari was granted to determine whether the Seventh Circuit was correct in holding that mere negligence was adequate to replace scienter—but here

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* *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Ernst & Ernst* v. *Hochfelder*, *cert. granted*, 421 U.S. 909 (1975) (Docket No. 74-1042), *reported below*, 503 F.2d 1100 (7th Cir. 1974).

** *TSC Industries, Inc.* v. *Northway, Inc.*, *cert. granted*, 44 U.S.L.W. 3180 (Oct. 6, 1975) (Docket No. 74-1471), *reported below*, 512 F.2d 324 (7th Cir. 1975).

the Second Circuit flatly rejected mere negligence and insisted on the traditional standard of actual knowledge of falsity or reckless disregard for the truth (A 35)—standards satisfied by the trial record and no longer seriously disputed by petitioners.*

And finally, in *TSC*, this Court granted certiorari to determine whether the Seventh Circuit properly decided on summary judgment the question of "materiality" as to omissions in proxy material, on the legal theory that some few stockholders "might" have regarded the omitted material as important—whereas here the court found, after a fully-litigated trial, that the $13 million BAR over-valuation, the description of Grumman's option as a $20 million obligation and the other fraudulent statements "would" have been regarded as material to stockholders.** Indeed, petitioners, who had a full opportunity to rebut those matters at trial, do not raise the issue of materiality in their certiorari petitions. Nor do they deny that they violated the anti-fraud provisions of the securities acts.

In short, there is nothing in the opinions in *Rondeau* and *Blue Chip* or the decisions to grant certiorari in *Hochfelder* and *TSC* that indicates that certiorari should be granted here. Indeed, *Chris-Craft* is the very antithesis of those cases. *Chris-Craft* applied the rigorous standards for which petitioners in those cases contend and, indeed, they cite *Chris-Craft* as support for their positions. Since petitioners here were found liable on the basis of overwhelming evidence under the strict standards imposed by the Second Cir-

* Petitioners' repeated references to the SEC's *amicus* brief in *Hochfelder*, inapposite on their face, disregard the SEC's *amicus* briefs here supporting Chris-Craft on the merits of the three appeals.

** *See, e.g.*, A 35, 38, 40-42, 45-46, 62.

cuit, they would *a fortiori* be liable under the less stringent standards being challenged in *Hochfelder* and *TSC*.

Chris-Craft does not break new ground or raise novel questions of law. It is fully consistent both with this Court's recent actions as well as its earlier landmark opinions in cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); and *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). The Second Circuit's widely-cited opinions here are in accord with this Court's balanced policy of encouraging legitimate private actions to enforce the securities laws (*Borak*) while, at the same time, preventing strike suits (*Blue Chip*).

Recognizing that this Court's recent actions cannot be twisted into a basis for granting certiorari, petitioners fall back on a hodge-podge of subsidiary arguments.

(1) They reargue the questions of standing, scienter and causation raised in their prior certiorari petitions—claims dismissed as "frivolous" by a unanimous Second Circuit.

(2) They feign confusion about the appropriate measure of damages. But they were on full notice of the correct damage standard and submitted their own star witness to rebut Chris-Craft's damage case. No claim is made that the Second Circuit used an incorrect legal principle in calculating damages based on an undisputed and largely documentary record.

(3) Petitioners complain about being held jointly and severally liable and blame each other in a game of musical chairs. But they were jointly and severally liable as a matter of hornbook law. Petitioners' internecine squabble about relative culpability—not properly raised on these certiorari petitions—can be resolved by petitioners themselves another day in another proceeding for contribution.

(4) Finally, First Boston seeks immunity on the theory that Section 11 of the 1933 Act shields it from liability in control contests no matter what it does. But here, First Boston was found guilty of violating not Section 11 of the 1933 Act but the more stringent anti-fraud provisions of Section 14(e) of the Williams Act. It has been well-settled law for almost a quarter of a century that persons guilty of such a violation cannot hide behind Section 11.

Acceptance of petitioners' arguments—none of which merits certiorari—would emasculate the securities laws and apply the law of the jungle to contests for control of public corporations. It would place a premium on violating the law by allowing wrongdoers to keep their booty, while denying their victims any compensation.

I

IN HOLDING PETITIONERS LIABLE, THE SECOND CIRCUIT APPLIED TRADITIONAL STANDARDS OF STANDING, SCIENTER AND CAUSATION.

Standing

1. Section 14(e)

Bangor is the only petitioner still arguing that Chris-Craft lacks standing under Section 14(e). It claims (pp. 18-20) that Chris-Craft cannot sue on account of Bangor's fraudulent exchange offer because Chris-Craft did not accept that offer and, therefore, was not a "buyer" under *Blue Chip*, and also that Chris-Craft is not among the class of persons intended to be protected by Section 14(e). Those are sham claims that raise no issue worthy of certiorari.

Bangor's reliance on *Blue Chip* is clearly misplaced. Section 14(e), unlike Rule 10b-5 involved in *Blue Chip*, does not contain a buyer-seller requirement but instead prohibits any fraudulent or manipulative act "in connection with any tender offer" or opposition thereto.* Any doubts which may have existed about the standing of tender offerors under Rule 10b-5 prior to 1968 were put to rest that year by the enactment of Section 14(e) of the Williams Act.** Bangor cites no precedent to support its argument,

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* Chris-Craft, of course, did not accept Bangor's exchange offer: it had its own simultaneous competing offer in connection with the control contest.

** *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970) (Section 14(e) "should serve to resolve any doubts about standing in the tender offer

(footnote continued on next page)

and courts and commentators agree that control contestants have standing under Section 14(e).*

In short, Section 14(e) protects *all* parties involved in a control contest. That is clear, not only from the authorities and the broad sweep of the statute, but also from its legislative history. For example, as noted in *Rondeau*, 95 S.Ct. at 2076, the House Report on the Williams Act states:

> "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." H.R. Rep. No. 1711, 90th Cong. 2d Sess. 4 (1968)

The universal view that parties in Chris-Craft's position have standing under Section 14(e) follows from *J. I.*

cases . . ."); *Electronic Specialty Corp.* v. *Int'l Controls Corp.*, 409 F.2d 937, 940-41 (2d Cir. 1969) (Judge Friendly noted that Section 14(e) "applies Rule 10b-5 both to the offeror and to the opposition—very likely, except perhaps for any bearing it may have on the issue of standing, only a codification of existing case law"); *Iroquois Indust., Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 544 (2d Cir. 1967).

* *See, e.g., H. K. Porter Co., Inc.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973); *Butler Aviation Int'l, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n. 1 (2d Cir. 1970); *Electronic Specialty Corp.* v. *Int'l Controls Corp., supra*, 409 F.2d at 945-46 (2d Cir. 1969); *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971). *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1260 (1973); Aranow & Einhorn, *Tender Offers for Corporate Control* 117-21 (1973); Binder, *Securities Law of Contested Tender Offers*, 18 N.Y.L.F. 569, 627-28 (1973); 1 Bromberg, *Securities Law: Fraud* §6.3 at 1000 *et seq.* (1974); Mundheim, *Tender Offers*, 2 Rev. of Securities Reg. 953, 956 (1969).

Case Co. v. *Borak, supra*, 377 U.S. at 429, 432, where this Court found an implied cause of action for opponents of management under Section 14(a) in proxy contests. Four years later, Congress passed Section 14(e) of the Williams Act to bring tender offers under the same legal standards of fair play as proxy contests.* There is no logic to Bangor's theory that a contestant for control has standing if he proceeds by a proxy fight rather than a tender offer.**

2. *Rule 10b-6*

Bangor claims (pp. 17-18) that Chris-Craft lacks standing under Rule 10b-6 because Chris-Craft did not purchase the key 7½% blocks for cash and thus fails to satisfy the "buyer" doctrine of *Blue Chip*. That stands *Blue Chip* on its head. Chris-Craft could have bought those shares only if it were willing to violate Rule 10b-6. It is absurd to argue that Chris-Craft lacks standing because it obeyed that rule and that Bangor is immune because it violated the rule. Since those shares were vital for control and since Bangor seized them in defiance of the SEC whereas Chris-Craft obeyed the SEC, it is difficult to imagine a stronger case for standing.

In addition, as noted above, Chris-Craft clearly has standing under Section 14(e). That section prohibits any

* *E.g.*, S. Rep. No. 550, 90th Cong. 1st Sess. 2 (1967). *See Electronic Specialty Co.* v. *Int'l Controls Corp., supra*, 409 F.2d at 945; *Dyer* v. *Eastern Trust & Banking Co., supra*, 336 F. Supp. at 907.

** Bangor's reliance (pp. 18-20) on *Rondeau* and *Cort* v. *Ash*, 422 U.S. 66 (1975), for its standing argument backfires. *Rondeau* specifically emphasizes that the Williams Act was designed to protect parties like Chris-Craft making tender offers as well as management of the target company, 95 S.Ct. at 2076; and *Cort*, repeatedly citing *Borak*, stresses that a private cause of action for damages is properly implied to enforce the anti-fraud provisions of the securities acts, including Section 14. 95 S.Ct. 2080, 2088 and n. 11, 2090, 2091.

"fraudulent, deceptive, or manipulative acts" in connection with control contests. Violations of Rule 10b-6 are "manipulative acts" covered by Section 14(e).* That furnishes an additional basis for Chris-Craft's standing.

In sum, *Blue Chip* is designed to discourage strike suits by third parties who speculate in court without having committed themselves in the marketplace. But here, Chris-Craft spent millions of dollars buying Piper shares in the expectation of a fair race. Its investment was destroyed by petitioners' violations aimed at Chris-Craft. Standing is clear.

Scienter

Bangor is the only petitioner still claiming (pp. 20-24) that it did not act with scienter and that the Second Circuit somehow eliminated the scienter requirement. Those spurious claims hardly merit reply. The Court in *Chris-Craft II* clearly insisted on scienter, which it defined as "knowledge of falsity or reckless disregard for the truth"; it stated that mere negligence is not enough (A 35, 96, 105-106). The formulation of scienter in *Chris-Craft* is as strict as that required in any other circuit.**

* Indeed, Rule 10b-6 begins with the words, "It shall constitute a 'manipulative or deceptive device or contrivance' . . ." 17 C.F.R. §240.10b-6.

** *See, e.g., Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5th Cir. 1974); *Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402, 407 (3d Cir. 1974); *SEC* v. *Coffey*, 493 F.2d 1304 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); *Clegg* v. *Conk*, 507 F.2d 1351, 1362 (10th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3659 (June 16, 1975). Bangor argues (p. 23) that Judge Friendly in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301 n. 20 (2d Cir. 1973), indicated that *Chris-Craft* eliminates scienter. On the contrary, Judge Friendly specifically recognized Chris-Craft's "recent holding . . . that scienter must be proved in a private action under section 14(e) . . ." *Id.* at 1299 n. 17.

There is no merit to Bangor's contention (pp. 20-21) that this Court's grant of certiorari in *Hochfelder, supra,* requires similar action here. The issue in *Hochfelder* is whether mere negligence by an accounting firm will support liability for securities fraud. But, as noted, the Second Circuit here demanded actual knowledge of falsity or reckless disregard for the truth (A 35).* Here, there is overwhelming culpability no matter how scienter is defined.

Finally, Bangor suggests (p. 21) that it violated Section 14(e) and Rule 10b-6 "in reasonable reliance upon the unanimous opinion of expert legal and accounting advisers." That is a false factual claim. Bangor purchased the 7½% blocks for cash in *defiance* of its own lawyers' advice, several days after the SEC's warning (1645A); and the Second Circuit held that the Bangor petitioners actually "knew that the book value of the BAR set forth in the registration statement was no longer realistic" (A 48),** a fact confirmed by their authorization of its sale for a $13,400,000 loss four days after the close of the control contest (A 44).

Causation

Petitioners argue, as in their prior certiorari petitions, that the Second Circuit eliminated the causation requirement and misapplied *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). Those claims, lacking in merit, surely

* In fact, the auditors in *Hochfelder* cite *Chris-Craft II* as one of the many cases requiring strict proof of scienter. *See* Petition for Certiorari in *Ernst & Ernst* v. *Hochfelder, supra,* at 10-11 n.; Petitioners' Brief at 52-53 n. **.

** *See also* D 6, 13-14.

do not present an issue for certiorari here. In the unique factual setting of this case, causation was not problematical. It was a mathematical certainty.

1. Bangor made illegal cash purchases of 7½% of Piper's stock in violation of Rule 10b-6.

2. Bangor obtained an additional 7% of Piper's stock by a fraudulent exchange offer.

3. Without either block, Bangor would lack its 50% majority.

4. Without both blocks, Chris-Craft would have led by at least 41%-31% at the end of the competing exchange offers, and could not have been overtaken, according to experts on both sides.

5. In fact, Chris-Craft would have had an even larger lead because, as the Second Circuit pointed out, the Piper insiders dissuaded Piper's public shareholders from tendering more shares to Chris-Craft throughout the contest (A 62).

Thus, causation was established here under any standard. Petitioners could not overcome the undisputed statistics establishing causation after trial. This was not a summary judgment case like *TSC* where a court had to engage in speculation. Because Bangor concededly gained 50% control by unlawful transactions and thereby destroyed Chris-Craft's investment, causation is far clearer here than in *Mills, Ute* or their progeny.

With respect to Bangor's acquisition of 7% of Piper's stock by its fraudulent exchange offer, petitioners claim that the Second Circuit should have ignored *Mills* and *Ute*

because it was Piper's public stockholders, rather than Chris-Craft, who relied on the false BAR value. But, as the Second Circuit noted in its often-cited opinion in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 796 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970):

> "When Crane entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions."

The elementary principle enunciated in *Crane* is well-established law that requires no review by this Court.* Indeed, as shown above at p. 20, the very purpose of Section 14(e) is to protect against acts which dupe stockholders into siding with the wrongdoer in control contests.

Bangor illogically argues (p. 26) that its unlawful acquisition of 14½% of Piper stock is wholly irrelevant because Chris-Craft theoretically could nonetheless have won control at the end of the competing exchange offers and that Bangor really achieved control when it purchased 5% of Piper's stock in August. But it is nonsense to ignore the illegal 14½% and consider only the 5%. Moreover, with Bangor's illegal 45%-41% lead in August, all the

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* *See, e.g., Herbst* v. *Int'l Telephone & Telegraph Co.*, 495 F.2d 1308, 1315-16 (2d Cir. 1974); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972); *Union Pacific R.R. Co.* v. *Chicago & North Western Ry. Co.*, 226 F. Supp. 400 (N.D. Ill. 1964), cited with approval in *Mills, supra*, 396 U.S. at 385. As explained by the Second Circuit, the fact that petitioners deceived large numbers of Piper shareholders in order to discourage them from dealing with Chris-Craft makes application of the *Mills-Ute* test particularly appropriate (A 59).

experts agreed that it was realistically in an unbeatable position. Conversely, in the absence of Bangor's illegal acquisitions, victory would have been a practical certainty for Chris-Craft, according to experts on both sides. Those undisputed factual issues, fully litigated, create no issue for certiorari.

Finally, the Piper insiders claim (p. 12) that their fraudulent statements in January could not have injured Chris-Craft because the contest was not definitely decided until a number of months later. But those false statements, as the Second Circuit specifically found, not only discouraged Piper's shareholders from tendering more stock in response to Chris-Craft's cash tender offer in January, but also had a continuing adverse impact on Chris-Craft's later exchange offer to Piper's shareholders (A 62-63). Again, this is a litigated factual issue not worthy of certiorari.

Petitioners' mishmash of causation arguments, when stripped of their verbiage, boil down to speculation that they *might* have won control even if they had not cheated, and that Chris-Craft, despite its commanding lawful plurality in an honest battle, must prove that it *definitely* would have won if petitioners had obeyed the law. Such a cynical argument, seeking to resolve all remote speculation in favor of the wrongdoer and against his victim, reverses this Court's rationale in *Mills* and *Ute*. Moreover, it offends the cardinal principle recognized in *Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). There the defendants claimed immunity on the theory that the plaintiff had not established that it *definitely* would have been better off under the conditions that *might* have prevailed

in a marketplace not affected by defendants' antitrust violations. In rejecting that contention, this Court declared:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created. See *Package Closure Corp.* v. *Sealright Co.*, 141 F.2d 972, 979. That principle is an ancient one, *Armory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suits. . . ." *Id.*

There is no genuine question as to causation here, much less a novel or disputed principle of general application that calls for certiorari.* The facts make this a *sui generis* case of overwhelming causation under any standard.

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* There is no merit to claims by Bangor (p. 26) and the Pipers (p. 13) that *Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402 (3rd Cir. 1974) and *Carras* v. *Burns*, 516 F.2d 251 (4th Cir. 1975), are in conflict with *Chris-Craft* because those cases considered evidence to rebut the *Mills-Ute* presumption. Those cases involved face-to-face transactions, which do not present the problems of proving the reactions of thousands of stockholders that the *Mills* presumption was designed to avoid. In any event, assuming *arguendo* that the presumption of reliance is rebuttable, petitioners here had ample opportunity to attempt such rebuttal at trial, but they failed.

II

ALL PETITIONERS WERE CORRECTLY HELD JOINTLY AND SEVERALLY LIABLE.

The Second Circuit held petitioners jointly and severally liable because "the conduct of each of the petitioners, through their violation of the securities laws, contributed to the success of BPC's takeover attempt . . ." (A. 69, B 4). The Piper insiders (pp. 15-18) and First Boston (p. 12) now argue that they should not be jointly and severally liable but that instead damages should be apportioned according to each petitioner's relative culpability. This hardly merits certiorari. It is hornbook law that individual tortfeasors whose combined misdeeds contribute to an indivisible injury (here, converting Chris-Craft's block from a control opportunity into an unsalable minority) are jointly and severally liable, especially when they cooperate in a campaign against their victim.

For example, Dean Prosser states:

> "Where two or more causes combine to produce . . . a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it. . . . The duties which are owed to the plaintiff by defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made." Prosser, *Law of Torts* 315-16 (4th ed. 1971) (footnotes omitted)*

* Similarly, this Court has held that where the misdeeds of two defendants concur to cause a single harm, joint and several liability

Prosser gives this example: if two defendants separately shoot a victim and he dies from the effect of both wounds, liability cannot logically be divided, and each defendant will be held liable for the whole loss. Here, all petitioners shot at Chris-Craft and hit the bulls-eye.

The traditional rule discussed by Dean Prosser is also hornbook law in the securities field. Thus, Professor Loss notes:

> "When a number of defendants have participated in a scheme that would have collapsed if any of the defendants had made the disclosure required by Rule 10b-5, there is no way to apportion guilt. Under these conditions, it is appropriate to apply the principle that each joint tortfeasor is liable for the full amount of damages. Ross v. Licht, 263 F. Supp. 305, 411 (S.D. N.Y. 1967), citing Restatement of Torts §§875-76." VI Loss, *Securities Regulation* 3924 (Supp. to 2d ed. 1969).

The time-honored legal principles of joint and several liability require no grant of certiorari here.

Nor need the Court review the application of those ancient legal principles to the particular facts here. There is no dispute that the Pipers initiated the campaign against Chris-Craft, issued fraudulent statements that adversely affected it from start to finish and recruited First Boston and Bangor. By the same token, First Boston—involved throughout the campaign—delivered the final blow by promoting the fraudulent Bangor prospectus while on notice

is required. *Miller* v. *Union Pacific R.R. Co.*, 290 U.S. 227, 236 (1933); *Aro Mfg. Co., Inc.* v. *Convertible Top Replacement Co., Inc.*, 377 U.S. 476, 500-01 (1964). *See also*, 1 Harper & James, *Law of Torts* §10.1 at 692-93, 697-98 (1956); *Michie* v. *Great Lakes Steel Division, National Steel Corp.*, 495 F.2d 213, 217-18 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974), relied on by the Pipers (p. 17 n. **).

of its falsity. These were not mere strangers striking the same victim by mere chance. Petitioners, all with substantial stakes in the success of the campaign against Chris-Craft,* are jointly and severally liable under conventional legal principles.**

The Pipers' final claim (p. 17) that damages should be apportioned is not properly raised on this certiorari peti-

* The Pipers sold their shares to Bangor for almost $35 million in Bangor securities and also had a $13 million contingent bonus (A 14, 40). First Boston, contrary to the implication in its petition (p. 12), had substantial financial interests in the campaign against Chris-Craft. Wholly apart from acting as underwriter for Bangor's false prospectus, First Boston was the paid investment adviser to the Pipers and to Bangor over a period of almost a year. Bangor agreed to pay First Boston "an amount not yet determined" (EV 35) if it obtained control of Piper. Although never publicly revealed, the amount is of sufficient magnitude to warrant a separate notation in Bangor's and Piper's financials. *See, e.g.*, Bangor's Annual Report for 1973, Financials, p. 20; EV 1026.

** There is similarly no merit to the Pipers' alternative claim (pp. 15-18) that they can somehow escape liability because the other petitioners were supervening causes who delivered the knockout blow several months after the Pipers' original kidney punches. The law on this point, also well-settled, does not call for certiorari. The doctrine of "intervening" cause in the negligence cases cited by the Pipers (p. 16) does not apply to these intentional misdeeds, because the Pipers brought the other wrongdoers into the plan against Chris-Craft and because the Pipers' fraudulent public statements had a continuing adverse impact on Chris-Craft throughout the contest (*i.e.*, every time it attempted to attract Piper stockholders). *See, e.g., Freeman* v. *United States*, 509 F.2d 626, 633-34 (6th Cir. 1975); *Lopez* v. *Southern Pacific Co.*, 499 F.2d 767, 772 (10th Cir. 1974); *Michael* v *United States*, 338 F.2d 219, 220-21 (6th Cir. 1964). The last case, cited by the Pipers (p. 16 n. **), states:

> "We recognize the rule that the negligent act need not be the final and immediate cause but may be actionable if it is a cause concurring with other negligence in proximately bringing about the charged injury." 338 F.2d at 221.

If mere negligence with a continuing effect overcomes claims of "supervening cause," surely the repeated willful violations by the Pipers —which the Second Circuit held had a continuous adverse impact on Chris-Craft (A 62)—are sufficient for liability.

tion. While the Pipers' pre-trial brief in *Chris-Craft III** stated that if damages were awarded "with all defendants jointly and severally liable," the trial court "at an appropriate stage thereafter . . . should determine the rights and liabilities of the defendants to each other . . . ," the Pipers never pressed that request nor made cross-complaints against the other petitioners. Now, however, they as well as First Boston are free to pursue a contribution proceeding, where each petitioner can seek to lay blame at the other's doorstep. Once again, that involves settled legal principles:

> "[T]he plaintiff's right to recover for his harm should not depend on his ability to apportion the damage. . . . [T]his is a problem which is properly left with the defendants themselves." 1 Harper & James, *supra*, §10.1 at 702**

III

THERE IS NO MERIT TO FIRST BOSTON'S CLAIM OF IMMUNITY UNDER THE 1933 ACT.

First Boston's principal—indeed, virtually its sole—claim is that it is immune from liability because of the special limitations for underwriters in Section 11 of the 1933 Act.† But, contrary to the pivotal assumption of its

* Feb. 28, 1974, p. 2 n.

** Thus, in *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.) (*per curiam*), *cert. denied*, 404 U.S. 941 (1971), Judge Frankel allowed contribution on the post-judgment motion of Blair & Co. after the plaintiff's judgment had been paid in full by the underwriter. *See also, Gould* v. *American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974) (contribution allowable to less culpable tortfeasor from jointly and severally liable co-defendants after he had paid more than his fair share of the judgment).

† 15 U.S.C. §77k.

petition, First Boston was not held liable under Section 11 of the 1933 Act for mere negligence (*i.e.*, for failing to discharge its "due diligence" duty). Rather, it was found liable under the antifraud provisions of Section 14(e) of the 1934 Act because it was on notice that Bangor's registration statement was false. The Second Circuit was crystal clear on that point (A 51-55, 116-17, B 10). And the law is equally clear that an underwriter found guilty of violating one of the antifraud provisions of the securities laws is not shielded by Section 11. That has been the law for a quarter of a century.

The leading opinion, *Fischman* v. *Raytheon Manufacturing Co.*, 188 F.2d 783 (2d Cir. 1951), was written by Judge Jerome Frank, formerly Chairman of the SEC. In *Fischman*, the Second Circuit held that when a fraudulent prospectus for preferred stock also had the effect of misleading holders of common stock, they had standing to sue under the antifraud provisions of Section 10(b)—the model for Section 14(e)—although they had no standing under Section 11. Judge Frank declared: "Were this not true, Section 11 of the 1933 Act, designed to protect investors even when there is no fraud, would afford a shelter or sanctuary for those who defraud investors." *Id.* at 787. Since *Fischman*, this rule has been adopted in the numerous cases which considered the question.*

* *See, e.g., Newman* v. *Prior*, 518 F.2d 97, 99 (4th Cir. 1975); *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973) (*en banc*); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 125 and n. 3 (7th Cir. 1972); *Donlon Indust., Inc.* v. *Forte*, 402 F.2d 935, 936 n. 2 (2d Cir. 1968) (Friendly, J.); *Jordan Building Corp.* v. *Doyle, O'Connor & Co., Inc.*, 401 F.2d 47, 49-51 (7th Cir. 1968); *McClure* v. *Borne Chemical Co., Inc.*, 292 F.2d 824, 836-37 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961); *Ellis* v. *Carter*, 291 F.2d 270, 272-74 (9th Cir. 1961); *Matheson* v. *Armbrust*, 284 F.2d 670, 674-75 (9th Cir. 1960), *cert. denied*, 365 U.S. 870 (1961); and *see* (re damages), *Grossman, Faber & Miller, P.A.* v. *Cable Funding Corp.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,913 at 97,120-21 (D. Del. 1974); *Benzoni* v. *Greve* [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,912 at 97,112 n. 7 (S.D.N.Y. 1974); *Unicorn Field, Inc.* v. *Cannon Group, Inc.*, 60 F.R.D. 217, 226-27 (S.D.N.Y. 1973).

Indeed, First Boston's original trial memorandum* adopted the *Fischman* rationale:

> "Chris-Craft . . . admits it is not entitled to sue under the 1933 Act. To have standing thereunder, a plaintiff must have purchased securities offered by the prospectus. The distinction between what must be proven under the 1934 Act as against the 1933 Act has long been recognized. In *Fishman* [sic] v. *Raytheon, supra,* Judge Frank laid down the rule that a plaintiff without standing under the 1933 Act must prove the additional element of fraud to recover under Rule 10b-5."

First Boston has thus provided a full reply to its own certiorari petition.

First Boston's new theory, if accepted, would lead to the anomalous result that an underwriter who issues a false press release is liable for full compensatory damages, whereas one who issues a false prospectus—a more solemn and important document—would be entitled to the benefit of limited liability under Section 11(e). In effect, First Boston seeks to make bankers a privileged class. But *Chris-Craft* emphasized that the very stature of this underwriter gave it greater clout to cause harm because of public reliance on its prestigious name (A 50-51). Investment bank-

* March 4, 1971, at 19-20.

ers and underwriters, like lawyers, accountants and ordinary citizens, have been held liable under antifraud provisions in many cases.* As Judge Friendly has stated:

> "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

Investment bankers can wield the same "chisel or crowbar." Here, First Boston did.

IV

IN CALCULATING THE MINIMUM MEASURE OF DAMAGES, THE SECOND CIRCUIT APPLIED TRADITIONAL AND CONSERVATIVE LEGAL STANDARDS TO UNDISPUTED FACTS.

Bangor and the Pipers focus their principal attack on the quantum of damages. But the unanimous Second Circuit emphasized that the award was "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). And it added: "Approximately the same award of damages would result if we were to accept Gant's [petitioners' expert's]

* *See, e.g., Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1289 (2d Cir.), *cert. denied*, 397 U.S. 913 (1970); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 231, 241 (2d Cir. 1974); *Herbst* v. *Int'l Telephone & Telegraph Corp.*, 495 F.2d 750, 761 (5th Cir. 1974); *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5th Cir. 1974); *Jordan Building Corp.* v. *Doyle, O'Connor & Co.*, 401 F.2d 47 (7th Cir. 1968). *See also In re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973); *Dorfman* v. *First Boston Corp.*, 336 F. Supp. 1089 (E.D. Pa. 1972).

testimony regarding a private placement of CCI's 42% minority interest" (B 31 n. 24). On the damage issue, petitioners do not raise a single legal issue worthy of certiorari. They do not challenge the standard used by the Second Circuit nor its application to the undisputed and largely documentary record (B 23). In effect, they ask this Court for a chance to re-try the damage issue.

Petitioners Have Had Their Day in Court

Bangor (pp. 30-33) and the Piper insiders (pp. 20, 22) now pretend that they were confused by *Chris-Craft II's* statements as to the nature of Chris-Craft's damages and therefore did not put their best foot forward at the damage trial in *Chris-Craft III*. That is nonsense. In *Chris-Craft II*, the Second Circuit repeatedly stressed the scope of Chris-Craft's enormous loss, emphasizing that Chris-Craft had suffered a significant decline in the value of its multi-million dollar Piper investment for which it was to receive compensatory damages (A 60, 66-67, 68-69, 111, 124, B 18-19).

Prior to the actual damage trial in *Chris-Craft III*, Chris-Craft announced in its pre-trial briefs and in the proposed joint pre-trial order that its proof would be based on the difference between (a) the cost (or higher value) of its Piper block *prior* to petitioners' violations and (b) the value of that block *after* Bangor's illegal seizure of control. Far from being confused, petitioners discussed that theory at length in their own pre-trial briefs. And at the trial itself, Chris-Craft presented evidence to support its damage theory in the form of written reports by experts (ex-

changed in advance of trial) plus live testimony essentially tracking those reports (B 23). Petitioners offered their own evidence to rebut Chris-Craft's damage case. Their star expert Gant was specifically put on the stand for that very purpose.

The Second Circuit in *Chris-Craft III* calculated the decline in the value of Chris-Craft's holdings attributable to petitioners' violations according to the trial evidence which, it noted, was largely documentary and uncontroverted as to the pertinent facts (B 22-23, 30). On the basis of the undisputed record, the Second Circuit applied well-established legal theories in calculating damages.* Defendants do not attack the court's legal standard of damages. They do not suggest an alternate legal theory. They do not raise an issue worthy of certiorari—just an inappropriate request for a third trial.**

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* *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1173 (2d Cir. 1970); *Esplin* v. *Hirschi*, 402 F.2d 94, 104-05 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965).

** At the damage trial in *Chris-Craft III*, petitioners had advanced their own erroneous theory of damages as well as attempting to meet Chris-Craft's evidence. At the damage trial, petitioners noted that *Chris-Craft II* at one point had referred to a reduction in "appraisal value"—a term which they hypothesized must have meant the value of a 100-share block in a state statutory appraisal proceeding commenced by a minority stockholder of Piper who dissented to a merger between Bangor and Piper. That bizarre theory, which had absolutely nothing to do with the factual setting in this case, naturally produced zero damages because it measured the intrinsic value of 100 shares of Piper the minute before and the minute after Bangor's seizure of control. But nobody reading *Chris-Craft II* could have seriously believed that the Second Circuit had meant to say that Chris-Craft had suffered no damages. The Second Circuit, of course, refused to accept the "zero damage" theory in *Chris-Craft III* (B 19-20). The fact that

Petitioners' Miscellaneous Damage Claims

(1) There is no merit to Bangor's (pp. 29-33) and the Pipers' (pp. 20-22) challenge to the Second Circuit's power to fix damages rather than to remand, under 28 U.S.C. §2106, particularly because here there was an undisputed record on the key facts and the district judge had twice defied the Second Circuit's mandates in a litigation which had dragged on for six years while Chris-Craft continued to suffer grievous injury (B 23-24, 25, 30).*

(2) Bangor (pp. 27-28) and the Pipers (pp. 20-21) argue that in calculating damages the Second Circuit should not, as a matter of law, have used either: (a) Chris-Craft's cost as the *upside figure* because that cost reflected the inflationary impact of the control contest; or (b) the resale value of Chris-Craft's block in a public offering in January 1970 as the *downside figure* because that reflected a market decline in the period after Bangor's seizure of control in September 1969. But actual costs are the best index of value—a fundamental rule articulated in leading opinions by Justice Cardozo and Judge Learned Hand cited by the

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petitioners tried to foist that specious theory on the trial court is surely no ground for now giving petitioners a second damage trial, particularly since they also *did* present evidence on the correct damage theory at the trial in *Chris-Craft III*. And their own evidence on the correct damage theory, as noted by the Second Circuit (B 31 n. 24), yielded virtually the same quantum of damages as calculated by the appellate court in *Chris-Craft III*.

* *See, e.g., Georgia-Pacific Corp.* v. *U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295, 299-300 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971); *Petition of United States Steel Corp.*, 479 F.2d 489, 500-01 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Oil Screw Noah's Ark* v. *Bentley & Felton Corp.*, 322 F.2d 3, 9 (5th Cir. 1963); *Texas Co.* v. *R. O'Brien & Co.*, 242 F.2d 526, 529 (1st Cir. 1957); *Smith* v. *Dravo Corp.*, 208 F.2d 388, 391 (7th Cir. 1953); and *see* 9 Wright & Miller, *Federal Practice & Procedure* §2577 at 699-701 (1971).

Second Circuit (B 22 and n. 15). And while the market did decline between September 1969 and January 1970, it is undisputed on the trial record that the latter date was the first feasible time when Chris-Craft could have sold its block via a registered public offering, on assumptions most favorable to petitioners (*see* p. 13 and n. *, *supra*). Chris-Craft was, in effect, locked into its Piper investment until that time. That was not its fault. It was petitioners' fault. Wrongdoers, not their victims, bear risks created by their misdeeds under the traditional doctrine articulated in *Bigelow*.*

(3) Bangor claims (p. 5) that the damage award injures Piper shareholders who tendered Piper stock to it six years ago. But it cannot hide behind them. The relatively few former Piper public shareholders who still own Bangor stock six years after the control contest now have a right to rescind (A 89-92). Moreover, a denial of damages to Chris-Craft would injure the greater number of Piper shareholders who tendered to Chris-Craft, as well as Chris-Craft's thousands of other innocent shareholders.

* In a similar vein, Bangor speculates (p. 28) that *perhaps* Chris-Craft would have suffered the same injury if it had obtained control, because of the stock market decline. But, having deprived Chris-Craft of control by illegal means, Bangor cannot now ask this Court to accept its speculative assumptions that a majority block is worth no more than a minority (particularly since Bangor refused to switch positions with Chris-Craft) (2995A); or that Chris-Craft, if it had control, would have managed the affairs of Piper just as ineffectively as Bangor did; or that Chris-Craft might not, as the District Court believed (B 61), have sold its majority position before the market decline; or that Chris-Craft might not have, as Bangor allegedly feared, merged Piper into Chris-Craft. In effect, Bangor asks this Court to reverse the rule that uncertainties are resolved in favor of victims, not wrongdoers, under *Bigelow*, *Mills* and *Ute*. Again, Bangor raises bogus issues and matters that are not appropriate for certiorari.

(4) Finally, Bangor (pp. 13, 33) objects to the award of pre-judgment interest in view of the increased amount of the damages. But the trial judge awarded interest, and the Second Circuit affirmed, fully explaining the rationale for exercising discretion to award pre-judgment interest in this protracted six-year litigation (B 33).

In summary, on the damage issue, petitioners cannot point to any unsettled legal principle of broad application or a split among circuits worthy of certiorari. Their real grievance is not a legal one at all. They simply object to the size of the damage award. That is not a matter for certiorari. If the damages are substantial, that is because petitioners played for high stakes and caused massive injury. The damages, in fact, are the "minimum" amount that could have been awarded according to the Second Circuit and do not even fully compensate Chris-Craft for the crippling blow which it suffered.

V

PETITIONERS' PARADE OF IMAGINARY HORRORS DOES NOT WARRANT CERTIORARI.

Because there are no genuine legal issues that come close to warranting a grant of certiorari, petitioners raise an assortment of emotional pleas as a last resort. For example:

—The damages are large relative to petitioners' individual resources.

—Worthwhile take-over bids will be discouraged.

—Wall Street bankers will shun control contests.

—The opinions will open the floodgate to thousands of suits.

But if the damages are 'arge on an absolute basis, Chris-Craft's injuries were far arger.*

The contention that the *Chris-Craft* opinions may discourage tender offers, not borne out by facts, is illogical on its face. Chris-Craft, after all, was the initial tenderor that obeyed the law at all times—and was defeated by petitioners' illegal acts. If the wrongdoers escape, that indeed would discourage *legitimate* tender offers.

Pleas of special treatment for investment bankers come with particular ill grace. *See SEC* v. *Capital Gains Research Bureau, Inc., supra,* 375 U.S. at 186-87 (1963). Confidence in the capital markets cannot be restored if investment bankers are given *carte blanche* to violate the laws.

Finally, the notion that the opinions will stimulate an avalanche of "vexatious" litigation was recently refuted by Judge Weinfeld.** After repeatedly relying on the Second Circuit's rigorous standards in *Chris-Craft II*, he dismissed

* Moreover, although irrelevant, the actual impact on the lawbreakers will be substantially mitigated by tax deductibility, insurance and contribution. For example, there is a hollow ring to First Boston's present claim (p. 12) that the judgment represents a significant share of its net worth. In contrast, First Boston's Chairman recently announced on the Dow Jones broad tape that, even in the event that it paid the entire judgment itself, the net after-tax effect would be $16 million, which "would not impair the ability of First Boston to conduct its operations successfully" (April 15, 1975). That, of course, ignores all prospects of contribution. Moreover, First Boston's financial stake in Chris-Craft's defeat, contrary to its petition (p. 12), far exceeded the amount of its registration fee (*see* p. 30, n.*, *supra*).

** *Spielman* v. *General Host Corp.*, [Current] CCH Fed. Sec. L. Rep. ¶95,267 at 98,368 (S.D.N.Y. 1975). *See also, Beecher* v. *Able*, [Current] CCH Fed. Sec. L. Rep. ¶95,303 (S.D.N.Y. 1975).

an attack on an exchange offer, concluding that control contests have not become "a minefield in which the slightest misstep means substantial liability." Here, there were not slight missteps but gross violations.

Petitioners' potpourri of emotional arguments and pleas for special status—all contrary to public policy and ethical dealing in the marketplace—highlight the absence of any genuine issues meriting certiorari.

CONCLUSION

Six years have passed since petitioners crippled Chris-Craft by their repeated violations of law, which now stand admitted. At long last, Chris-Craft should receive compensation for its grievous injury. The petitions for certiorari should be denied.

Respectfully submitted,

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